

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1274

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee,

-against-

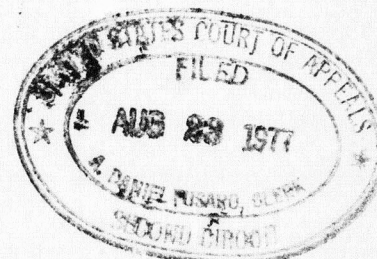
JOSE ACOSTA,
Appellant.
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B P/s
Docket No. 77-1274

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BRIEF FOR APPELLANT
JOSE ACOSTA

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the counterfeit bills in question were seized pursuant to an arrest effected without probable cause, when the police, by their own acknowledgement, possessed information sufficient to warrant only an investigatory stop.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Richard Owen, U.S.D.J.) entered June 16, 1977, convicting appellant Jose Acosta, upon his plea of guilty, of possessing counterfeit Federal Reserve Notes with intent to defraud (18 U.S.C. §472). Appellant was sentenced as a youth offender to treatment and supervision pursuant to 18 U.S.C. §§5010(b) and 5017(d), and he is currently serving that sentence.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Jose Acosta, appellant herein, was indicted for possession of counterfeit ten dollar Federal Reserve Notes with intent to defraud (18 U.S.C. §472).^{*} Appellant moved to suppress the counterfeit bills as having been obtained pursuant to an arrest lacking in probable cause, and a hearing was held (The Honorable Richard Owen, U.S.D.J.) on April 8, 1977 (see A, infra); the

^{*}The facts adduced at the guilty plea and sentencing proceedings show that appellant was in possession of seven bills and gave one of these to a friend knowing it to be counterfeit and intending it to be passed.

motion to suppress was denied in an oral decision announced on that date (see B, infra).

Appellant entered a plea of guilty to the indictment on May 9, 1977 before Judge Owen, reserving his right to appeal the denial of his suppression motion, upon the consent of the Government, pursuant to the procedure recognized and approved by this Court (see United States v. Pond, 523 F.2d 210, 212 (2d Cir. 1975); United States v. Faruolo, 506 F.2d 490, 491 n.2 (2d Cir. 1974)).

A. The evidence adduced at the suppression hearing.

On October 22, 1976, Jeffrey M. Horowitz, an employee of AT&T Long Lines with offices in White Plains, looked out his office window and saw someone approximately 350 feet away in a parking lot force entry into an old Volkswagen. Concluding that this person was engaged in car theft, Mr. Horowitz called the White Plains Police Department and reported the location. Mr. Horowitz continued his observations, and noticed that the suspect, turning in a direction which faced another parking lot, made a movement that Mr. Horowitz described as a hand signal. During this time, Mr. Horowitz maintained his telephone contact with the desk officer, and described everything he saw as it was occurring until the time an officer arrived (H 3-7).*

*Page references to the suppression hearing minutes are given in parentheses, preceded by "H".

On cross-examination, Mr. Horowitz acknowledged that the suspect was several blocks, or perhaps as much as one thousand feet, away (H 10), and that he was too far to allow any clear view of the suspect's face (H 13).^{*} It was Mr. Horowitz's "opinion at the time" that the suspect's hand movement was a beckoning to another, but he admitted that he saw no one respond to the motion (H 14, 15). In his deposition taken by an officer and signed on the day of this incident, Mr. Horowitz described the events he had observed but made no reference to any beckoning gesture of the suspect (H 16-18).

Officer George Lohse was the officer who received the telephone information from Mr. Horowitz and, pursuant thereto, dispatched other officers to investigate the matter. It was the officer's distinct recollection that Mr. Horowitz told him two persons were involved in what appeared to be a larceny (H 23, 25, 27). Officer Lohse noted that the information obtained from one of the police units at the scene (H 30) showed that the second person was walking toward 99 Church Street (H 35). The officer also indicated that a large shopping mall was located at 200 Hamilton Avenue, a few blocks away (H 37-38).

Officer Richard J. Smith was on patrol duty approximately

^{*}Since Mr. Horowitz claimed that he maintained visual contact with this person until the police arrived, his inability to identify the suspect (H 13) is irrelevant; but, in view of the fact that appellant was not the observed suspect but a putative accomplice to whom the "signal" was directed, Mr. Horowitz's ability to observe the suspect's activities in detail -- most particularly the nature of his hand motion -- is relevant.

one block from 40 Barker Avenue when he received a radio call concerning the attempted larceny. He responded to the call and found the suspect in custody; the suspect was placed in the rear of Officer Smith's car, and following Miranda warnings, the officer conducted an inquiry:

Q: What did you say to him and what was his response?

A: I asked him was he with anyone. He said yes, my friend.

Q: And --

A: And he described to me his friend.

Q: What did he tell you?

A: There was another male Puerto Rican. Approximate height five, nine. Medium afro. 22 years of age and he described the clothing which the subject was wearing.

Q: Do you remember what he said?

A: If I remember right the subject had a brown leather jacket on, a black shirt and grey trousers.

(H 42-43).

In response to Officer Smith's question of where the suspect's friend had gone, the suspect pointed to 99 Church Street (H 43). This information was broadcast on the police radio (H 43).

Officer Carl Bochterle heard the original radio transmission regarding the attempted larceny but did not respond to that call. However, when the second report was issued, describing a second person and placing him in the vicinity of 99 Church Street, a block from Officer Bochterle's position, the officer positioned himself in a hardware store and waited. He observed appellant

appear between 95 and 99 Church Street; "He came out, he looked in both directions and then he headed over towards Hamilton Avenue and started walking west on Hamilton Avenue." (H 49). The officer described his actions as follows:

Q: What did you do?

A: I walked parallel through the parking lot of the shopping center there towards Hamilton Avenue also, parallel as he was walking, and there came a time when I came up to a sign for the mall there and I stayed behind the sign until after he passed me, walking west on Hamilton Avenue.

Q: And then?

A: Then I came out from behind the sign and I grabbed him.

Q: What did you do after you grabbed him?

A: I told him that I want to speak to him about an alarm that was just given out, he matched the description of the subject that was wanted for larceny a block or so before. I asked him for identification. He said he didn't have any and I called for a radio car stating I had the subject in custody and another patrol car responded to my position on Hamilton Avenue and we walked him over to the patrol car and I patted him down for a weapon check and then I put handcuffs on him and placed him in the patrol car.

(H 49-50).

The officer agreed that he placed appellant under arrest on the basis of the radio dispatch alone, though he was unable to recall whether the information transmitted indicated that appellant had committed a larceny and though appellant, in distinction to the description of a fleeing suspect, was seen to be walking at all times (H 48, 52, 54, 55). Officer Bochterle also admitted

that he had not been requested to arrest appellant and that the communication had actually stated that appellant was wanted for "questioning" only (H 53, 54).

Officer Smith heard Officer Bochterle's transmission that he had located and stopped a person fitting the description Officer Smith had broadcast and, with the first suspect in his patrol car, he proceeded to Officer Bochterle's position. When he arrived at the scene, Officer Bochterle had already placed appellant in custody (H 43-44). Officer Smith's suspect, referring to appellant, told the officer, "That's my friend, don't tell him that I ratted him out" (H 44), and Officer Smith then took the suspect to the police station (H 44). In a conversation with Officer Bochterle, Officer Smith informed him that the suspect he had had in custody had identified appellant (H 44). At no time did Officer Smith attribute to his suspect any specific allegation that appellant had participated in criminal activity.

Officer Bochterle revealed that appellant was never charged with the attempted larceny in question, though the other individual was so charged (H 55-56). A search of appellant's person pursuant to his arrest by Officer Bochterle, however, produced six counterfeit Federal Reserve Notes which are the basis for the instant prosecution under 18 U.S.C. §472. The legality of this seizure of counterfeit bills is dependent upon the legality of appellant's arrest by the state officers for attempted larceny of the automobile.

B. The ruling on appellant's motion to suppress.

Argument on the motion focused on the ambiguous nature of the information the police had received from Mr. Horowitz and from the suspect arrested at the automobile.*

THE COURT: So then when they pick up the guy that he [Mr. Horowitz] is looking at and they say who is with you, and he says, my buddy --

MR. THAU [Defense Counsel]: But "with you," your Honor, doesn't mean "your criminal accomplice."

THE COURT: Well, I know, but your criminal accomplice is with you in a criminal venture by reason of the fact having broken into a car you say, okay, come on up. He smashes into the car, lifts up the hood and I have forgotten the exact sequence but having done all that, he then beckons to somebody and says, "Okay, come up."

MR. THAU: But that someone doesn't come.

* * *

THE COURT: That is why I say it is the question and it is a question whether from what Horowitz saw you could conclude that Acosta was either a conspirator or an aider and abettor in a car theft.

MR. THAU: Your Honor, it is the first time in my life that I hear so much argument about what someone saw who never saw my client.

* * *

THE COURT: ...The best cause in the world would be that Rodriguez [the suspect in the car theft] saying he is the guy that was with me, came with me to rob the car.

*The motion to suppress was directed chiefly to the seized counterfeit bills, but it also included a motion to suppress statements subsequently obtained from appellant on the ground that they were tainted by the illegal arrest and seizure (H 68-69).

MR. THAU: That is something else. If he had said he came with me to rob the car, that is one thing. That is an evidentiary showing of what the defendant had done, what his intention had been. Rodriguez says no such thing.

(H 61, 66, 68).

The court issued the following oral decision on appellant's motion:

THE COURT: Mr. Thau, I make the following conclusions of fact. I find that there was a larceny being committed on a Volkswagen which was crystal clear to Mr. Horowitz sitting in the window of his office window looking out. After the break-in had been accomplished Mr. Rodriguez, that's what his name subsequently turned out to be, clearly one could conclude was summoning a partner to the scene. Whether that partner was off the scene because he was a lookout or whether he was off the scene because he was chicken, I am not prepared to say, but obviously there was a partner who was being summoned to the scene much as a jackal summons another jackal to come in and feed on the carrion that had been opened up.

Mr. Horowitz thereupon reasonably calls the police and says there are two people involved in this even though he has only seen one and they broadcast a statement to the police officers, there are two people.

Having picked up that one person I find that Officer Smith, after reading his rights to Mr. Rodriguez, inquired of him whether he was with anyone and at that point got a very clear description of the other man and a statement of the direction that other man was going and Mr. Bochterle, hearing of this on his walkie talkie, positioned himself on the other side of the building toward which Mr. Rodriguez had pointed and thereupon saw Mr. Acosta coming through fitting that description very clearly, walked with him a distance parallel and then arrested him.

I find that the police officers of White Plains had reasonable cause to believe that Mr. Acosta was involved as a co-conspirator or an aider and abettor in the larceny of the automobile and that given that reasonable cause, the arrest was as a matter of law and I find as a matter of law that the arrest was a valid one based upon reasonable cause and I deny the motion to suppress.

(H 69-70).

ARGUMENT

THE COUNTERFEIT BILLS IN QUESTION WERE SEIZED PURSUANT TO AN ARREST EFFECTED WITHOUT PROBABLE CAUSE, WHEN THE POLICE, BY THEIR OWN ACKNOWLEDGEMENT, POSSESSED INFORMATION SUFFICIENT TO WARRANT ONLY AN INVESTIGATORY STOP.

After hearing a police radio transmission seeking a person of a specified physical description for "questioning" about a car theft, Officer Bochterle noticed appellant, who resembled the individual described in the radio transmission. Officer Bochterle observed nothing which gave him additional or corroborative information concerning appellant's involvement in any crime; moreover, appellant was seen walking* on a street near a large shopping mall on a weekday in the late morning, behavior which itself was not the least suspicious. Nevertheless, Officer Bochterle arrested appellant.

This arrest was conducted with less than the requisite probable cause (see Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Sibron v. New York, 392 U.S. 40, 65-66 (1968)). Those facts known to the transmitting officers and to Officer Bochterle would not "warrant a prudent man in believing that the petitioner had committed or was committing an offense" (Beck v. Ohio, 379 U.S. 89, 91 (1964)). In fact, it appears that appellant was not engaged in the criminal conduct which was the subject of the

*Officer Bochterle noted that the radio transmission had stated that appellant was "fleeing." Appellant, he admitted, was not fleeing.

522 F.2d 211, 214 (2d Cir. 1975);* cf. United States v. Robinson, 536 F.2d 1298, 1300 (9th Cir. 1976)). Hence, his arrest of appellant was lacking in probable cause and was illegal.

The central piece of evidence relied on by Officer Smith in seeking the person described by the arrested suspect was that suspect's acknowledgment that he had been "with" a friend. No syntactical or contextual construction can impute to this statement an unequivocal meaning; despite the fact that Officer Smith interpreted this ambiguous statement as an admission of criminal association, it was at least equally susceptible to an interpretation not incriminating the friend (e.g., the suspect's self-exculpatory claim in which the friend was his alibi). Since Officer Smith had not observed any joint criminal activity and had no reason to believe that someone not actually present was rendering material assistance in the theft of an automobile, his assumption that the suspect had enlisted his friend as a criminal accomplice was probably incorrect and certainly without adequate basis in fact.

The information Officer Lohse had received from Mr. Horowitz does not fill the gaps in Officer Smith's information. Mr. Horowitz described the action of a single individual who was engaged in stealing a car. In only one respect did Mr. Horowitz

*In Mungo, this Court observed: "While a police radio bulletin may justify immediate investigation, it does not establish probable cause for an arrest and search unless founded on information adequate to support a judicial determination of probable cause." Id., 522 F.2d at 214. This case has been vacated (96 S.Ct. 3215 (1976)) for consideration in light of Stone v. Powell, 428 U.S. 465 (1976); the Supreme Court did not pass on the merits of this Court's decision.

suggest the presence -- though not necessarily the criminal presence -- of another person: he testified to having seen the suspect make a hand signal. That the suspect was actually signalling is not beyond question; he was a considerable distance from the suspect -- as far as one thousand feet -- which would have made distinction between a signal and some innocuous motion difficult to draw. Moreover, the possibility that the suspect's hand movement was not considered by Mr. Horowitz as a signal is shown by his failure to disclose the hand signal in his deposition to the police immediately after the incident. But even if a signal was given, Mr. Horowitz was unable to attach any purpose to it; he saw neither the response nor the recipient, and thus, the signal was ambiguous both as to the suspect's intention and the nature of the participation of the signal's recipient. If speculative judgment regarding the meaning behind the signal is to be made, it should not be that the suspect was beckoning an accomplice, who was apparently out of voice range and would be of doubtful assistance at that distance, but that he was inviting an acquaintance, who had refused to assist or participate in the theft, to accept a ride.*

*The district court did not conclude that the evidence established appellant to have been a participant in this incident. Instead, the court concluded that the hand signal provided probable cause to believe appellant was involved in the car theft, upon the following reasoning:

"Whether that partner was off the scene because he was a lookout or whether he was off the scene because he was a chicken, I am not prepared

(Footnote continues on next page)

The totality of the information known to the police, therefore, was that a person suspected of attempting to steal an automobile had referred to having been with a friend sometime prior to his arrest and had presumably signaled to that friend after having secured entry into the automobile.* This allowed the officers to conclude that some further investigation was appropriate, and it would have been perfectly appropriate to

(Footnote continued from preceding page):

to say, but obviously there was a partner who was being summoned to the scene..."

The court's assumption that a party can be both a "chicken" and a "partner" is somewhat questionable; whether a person refrains from assisting in the commission of a crime out of higher motives or out of fear of the consequences, that person has not acted as a principal. See 18 U.S.C. §2; New York Penal Law §20.00. Judge Van Graafeiland recently had occasion to note (in dissent):

"[T]he lack of predisposition is not dependent upon the motive which brings it into being. The very reasons which the majority derides, predispose many of our citizens to walk the straight and narrow path." United States v. Steinberg (Riese), F.2d _____, Docket Nos. 76-1253, 76-1258, Slip op. at 2213 (March 7, 1977).

*The probable cause equation would not include the arrested suspect's identification of appellant as his "friend" who he had "ratted out" which was communicated to Officer Smith. This identification occurred after Officer Bochterle had placed appellant under arrest, and therefore, it cannot be cited as a source of preexisting probable cause. This information was not in the pool of knowledge imputed to the arresting officer because it was "communicated to no one until after the arrests [had] been made out of the observer's presence." United States v. DelPorte, 357 F. Supp. 969, 974 (S.D.N.Y.), aff'd, 483 F.2d 1399 (2d Cir. 1973).

stop appellant for purposes of inquiry. But Officer Bochterle's immediate arrest of appellant was not proper; a "prudent man" would not have been justified in believing that appellant had been involved in any attempted auto theft -- which in retrospect would not have been merely prudent but correct. It is of some note that the radio transmission issued by those officers possessing the information called for the questioning -- not the arrest -- of appellant. Apparently, the transmitting officer realized that the information known to the police was not sufficiently certain to merit appellant's arrest.

B. The arresting officer made no independent or corroborative observation which would establish probable cause to arrest appellant.

Had Officer Bochterle, through his own observations, sees suspicious conduct corroborating the information received or contributing new evidence of guilt, the conjunction of all this information might have provided probable cause to arrest appellant (See Draper v. United States, 358 U.S. 307 (1959); United States v. Acarino, 408 F.2d 512 (2nd Cir.), cert. denied, 395 U.S. 961 (1969); United States ex rel. Powell v. LaVallee, 385 F. Supp. 931, 935 (S.D.N.Y.), aff'd, 506 F.2d 1396 (1974), cert. denied, 420 U.S. 995 (1975).) But Officer Bochterle observed nothing suspicious in appellant's conduct, and the extent of his knowledge at the time he arrested appellant was no less inadequate than that of the transmitting officers. (See United States ex. rel. Mungo v.

LaVallee, supra, 522 F. 2d at 214-215).

Appellant's conduct was not inherently suspicious. Officer Bochterle recounted that appellant was first seen in the vicinity of 99 Church Street, the specified location, but was walking, not fleeing.* Nor was appellant's presence in the locale suspicious as a practical matter. Appellant was arrested near a large shopping mall during the daytime on a weekday. Officer Bochterle could draw no inculpatory inference against appellant from his own observations (cf. United States ex rel. McCullers v. McMann, 370 F.2d 757 (2d Cir. 1967)).

Under these circumstances, Officer Bochterle was not authorized to interfere with appellant's freedom to an extent greater than the communicated information warranted -- he was authorized to stop appellant for questioning. When appellant proved unable to produce identification, the officer would have been justified in pressing his questions further or temporarily detaining appellant until one of the investigating officers could question him; but the arrest he effected was, at that time, premature. Had he waited, the arrest, which gave rise to search in question, may not have occurred; the very same facts which convinced the state prosecutors not to attempt to prosecute appellant for auto theft might have come to light and resulted in appellant's release without an arrest and search.

*Officer Bochterle stated that the radio transmission indicated the suspect was "fleeing."

CONCLUSION

For the above stated reasons, the counterfeit bills seized pursuant to the illegal arrest of appellant should be suppressed, and the statements obtained thereafter should be suppressed as the tainted fruits of the illegal arrest and search.

Respectfully submitted,

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August 24, 1977

CERTIFICATE OF SERVICE

August 23, 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Steven Lloyd Barnett

